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No.

In the Supreme Court of the United States

October Term, 1982

PARSONS & WHITTEMORE ALABAMA MACHINERY AND SERVICE CORPORATION and PARSONS & WHITTEMORE, INC.,
Petitioners,

vs.

YEARGIN CONSTRUCTION COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether an arbitration award may be set aside under the Federal Arbitration Act, 9 U.S.C. §10, because of an *appearance of bias* on the part of an arbitrator.

2. Whether the decision of the Court of Appeals, which in effect requires a showing of *actual bias* as a basis for setting aside an arbitrator's award, is in conflict with this Court's decision in *Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 U.S. 145 (1968) (*"Commonwealth Coatings"*).

PARTIES

The caption of the case in this Court contains the names of all parties to the proceeding below.

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THE OPINION BELOW

The opinion of the Court of Appeals for the Eleventh Circuit appears in the appendix. That opinion has not been published.

JURISDICTION

The judgment below in favor of respondents was rendered and entered on August 5, 1982. Petitioners sought rehearing by petition dated August 25, 1982. That petition was denied October 21, 1982.

The jurisdiction of this Court to review the decision of the Court of Appeals by writ of certiorari is invoked pursuant to Rule 17.1(c) and (a) of this Court. The

court below, in determining whether an arbitration award should be vacated under the Federal Arbitration Act, 9 U.S.C. §10 because of the bias or partiality of an arbitrator, applied a test in conflict with that mandated by this Court in *Commonwealth Coatings*. There are additional grounds for a grant of certiorari in that the standard announced in *Commonwealth Coatings* has been the subject of conflicting interpretations and applications by various federal courts of appeal. See Rule 17.1(a) of the Supreme Court.

STATUTES

This case arises under the Federal Arbitration Act ("the Act"), 9 U.S.C. §§1-14, and most particularly under Sections 9 and 10 of the Act. Section 9 provides for confirmation of an arbitration award by a federal district court; Section 10 alternatively sets forth statutory grounds which justify vacation of the award, including corruption, fraud, and evident partiality on the part of an arbitrator. The text of Sections 9 and 10 of the Act is set forth fully in the Appendix.

STATEMENT OF THE CASE

This case arises out of a dispute over the construction of a pulp mill in the Northern District of Alabama. [Tr. 612.][1] The owners of the project, Parsons & Whittemore Alabama Machinery and Services Corporation and Parsons and Whittemore, Inc. (petitioners, hereafter collectively referred to as "P&W"), acted as their own prime contractor,

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1. References designated "Tr. ....." are to the transcript of the proceeding in the district court. References to the record on appeal appear as "R. ....." References to depositions are by the last name of the deponent, e.g., "Barge at ....." The record has not at this time been certified and transmitted to the Court.

contracting directly for the civil, mechanical, and electrical work to be performed.

In the course of construction a dispute arose between P&W and the mechanical subcontractor, Yeargin Construction Company (respondent, and hereafter "Yeargin"), which eventually resulted in P&W's terminating Yeargin's contract and completing the mechanical work. [Tr. 572.] Yeargin's and P&W's claims against each other were arbitrated before a three-man panel selected pursuant to the procedures of the American Arbitration Association ("the Association"). [R. 1-23, 42.] At issue was a total of approximately $14 million in claims by both parties. [Tr. 574.] In the largest award ever entered by the Association in its southeastern region of Georgia, Alabama, and Tennessee [Johnson at 38], the arbitration panel awarded Yeargin $5.3 million in damages, resulting from the alleged wrongful termination of Yeargin and P&W's purported delay of both the project schedule and Yeargin's performance. [R. 77; Poppleton at 38.]

Pursuant to the Federal Arbitration Act, 9 U.S.C. §10, P&W filed a petition for vacation of the award in the United States District Court for the Northern District of Alabama, charging that the proceedings before the panel had been flawed by a number of improprieties which denied P&W a fundamentally fair hearing. [R. 74-93.][2] Chief among those improprieties was the failure of an arbitrator to disclose three separate relationships with Yeargin.[3] First, the arbitrator had previously attended

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2. Yeargin also petitioned under Section 9 of the Act for confirmation of the award.

3. Also included among P&W's complaints about the hearing it received were the arbitrators' failure to postpone the hearing for good cause shown; their failure to allow P&W to present rebuttal testimony; and repeated failures by the panel and the Association to follow the Association's rules and procedures.

a seminar on construction scheduling conducted by James Waldron, Yeargin's sole witness on delay damages (alleged to exceed three million dollars). [Tr. 15-16, 578.] Second, that same arbitrator had been sufficiently impressed by Waldron's expertise to arrange for Waldron to teach another seminar to his employees; the subject of the seminar was the very topic encompassed in Waldron's expert testimony for Yeargin at the arbitration hearing. [Tr. 17, 579-80.] Finally, the company which the arbitrator served as vice-president was general contractor on a North Carolina construction project on which Yeargin performed as a subcontractor. [Tr 577-78, 581-82.]

Despite the Association's own rule that an arbitrator is under a "continuing duty" to disclose any relationship with a party or a witness of which he became aware at any stage of the arbitration, *the arbitrator never disclosed any of these past connections to P&W.* When the arbitrator learned that Waldron was to be a major witness, he revealed his past acquaintance with Waldron to a fellow member of the panel, but the connection was not disclosed to P&W by either arbitrator. [Tr. 577-78; Poppleton at 54.]

The arbitrator's omission was compounded by his continuing concealment of the Waldron relationship during post-award discovery. When questioned about any acquaintance he might have had with any witness, the arbitrator testified merely that he had taken a scheduling seminar under Mr. Waldron some "ten to fifteen years ago." [Morton at 51.] He made no mention that he had in 1975 employed Mr. Waldron to instruct his own employees, and to the contrary testified:

"Q. Was that [the seminar attended by the arbitrator] the only occasion that you had to know Mr. Waldron?

A. Yes."

[Morton at 53.] It was only through P&W's subsequent investigation that the true facts were learned.

The district court expressly found that each of the past associations with Waldron should have been disclosed [Tr. 580], but declined to set the award aside since the court found the concealment had not materially affected the outcome of the arbitration. [Tr. 580, 609.]

P&W appealed the district court's confirmation of the award, pointing out that the trial court had applied the same "actual bias" test which had been rejected by this Court in *Commonwealth Coatings*. In that case the Court instead established a *per se* rule that any failure by an arbitrator to disclose a past business or personal relationship - however innocent - creates an *appearance of bias* sufficient to justify invalidation of the award. *Commonwealth Coatings* at 148-49.

The Court of Appeals for the Eleventh Circuit, in affirming the district court, continued the misapplication of *Commonwealth Coatings*. While the Court of Appeals conceded that the plurality opinion in *Commonwealth Coatings* applied an "appearance of bias" test [slip op. at 14], the Court then engaged in an analysis which leaves little doubt that the standard which was in fact applied was that of actual bias. The Court engaged in a lengthy examination of the challenged relationships and the likelihood that those associations would have had any palpable effect on the arbitrator's objectivity. In focusing on the probable effect of the relationships rather than simply on the arbitrator's continuing concealment of them, the Court of Appeals joined a number of other courts which have offered varying, conflicting and often confused interpretations of the test required by *Commonwealth Coatings*.

ARGUMENT

The facts summarized above illuminate the need for a grant of certiorari if Section 10 of the Federal Arbitration Act, 9 U.S.C. §10, is to be uniformly applied in the federal court system. Not only is the decision below in conflict with the rule announced by this Court in *Commonwealth Coatings;* it joins a number of other opinions which have applied varying constructions of that precedent to measure the possible bias of an arbitrator. Although all claim to be guided by *Commonwealth Coatings,* the courts have diverged as to whether the "partiality" described in 9 U.S.C. §10 as one of the grounds for setting aside an award means "actual bias in fact" or merely an "appearance of bias."

P&W's petition has especial importance at a time when arbitration is being urged as a solution to the overcrowded court system. If parties have no assurance that they will receive a fundamentally fair hearing at the hands of an arbitration panel, they will surely be reluctant to elect arbitration, since in so choosing they effectively abandon the procedural and appellate safeguards of the courts.

The comparative freedom of arbitration awards from judicial review is well established. Awards are presumed to be valid; formal rules of evidence and procedure need not be followed; arbitrators are not required to give reasons for their decision; and awards are not reviewable for errors of fact or law. *Bernhardt v. Polygraphic Co.,* 350 U.S. 198 (1956); *Wilko v. Swan,* 346 U.S. 427 (1953).

It is precisely this plenary power of arbitrators which compelled the Supreme Court to hold that an arbitrator

must disclose any dealings which might create an impression of possible bias. In the leading case of *Commonwealth Coatings*, the Supreme Court outlined the constitutional dimensions of an arbitrator's duty to disclose: where that obligation is breached, the award may be set aside even where no actual bias has been alleged or shown. 393 U.S. at 147-48.

In *Commonwealth Coatings* a subcontractor arbitrated a dispute with the sureties for the general contractor. The third and supposedly neutral member of the panel had over a period of several years participated in sporadic business dealings with the general contractor, for which the arbitrator had received fees of approximately $12,000. This relationship was not disclosed to the subcontractor by either the general contractor or the arbitrator until the award had been made.

The Court reversed and vacated the award, holding that the "elementary requirements of impartiality taken for granted in every judicial proceeding" apply with even greater force to arbitrations:

> "It is true that arbitrators cannot sever all their ties with the business world, since they are not expected to get all their income from their work deciding cases, but we should, if anything, be even more scrupulous to safeguard the impartiality of arbitrators than judges, since the former have completely free rein to decide the law as well as the facts and are not subject to appellate review. We can perceive no way in which the effectiveness of the arbitration process will be hampered by the simple requirement that arbitrators disclose to the parties any dealings that might create an impression of possible bias."

393 U.S. at 148-49 (emphasis added).[4] The court ruled that the failure to disclose compelled vacation of the award on grounds both of fraud and corruption in the procurement, 9 U.S.C. §10(a); and of partiality on the part of the arbitrators, 9 U.S.C. §10(b).

The result in *Commonwealth Coatings* turns on the proposition that a party need not establish that a relationship actually resulted in partiality or bias on the part of an arbitrator. [*Compare* the slip opinion in this case at 15, where the Court of Appeals seems to require a showing of actual or at least probable bias.] Such a requirement would plunge the reviewing court into a difficult and imprecise analysis of the motives and thought processes of the arbitrator. The language from *Commonwealth Coatings* sweeps much more broadly, advocating "the simple and objective requirement that arbitrators disclose to the parties *any* dealings that *might* create *an impression* of *possible* bias." 393 U.S. at 148-49 (emphasis added). Indeed, it is instructive that the Court in *Commonwealth Coatings* found nothing in the record to suggest any improper motive, *other than* the undisclosed relationship; there was no evidence or implication that the relationship actually affected the arbitrator's ruling or deliberations. Instead, it was solely his failure to disclose a known re-

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4. Other courts have concurred that arbitrators are subject to a more stringent disclosure standard than are judges. In *Kinnear-Weed Corp. v. Humble Oil & Refining Co.*, 441 F.2d 631 (5th Cir. 1971), the Court of Appeals considered a petition to set aside a patent suit judgment on grounds that the judge had a substantial interest in the case and an improper connection with the defendant. The court refused to apply to a judge the rigorous, "immaculate and sterile" criteria which must govern an arbitrator. The court justified the distinction in part on the basis that a judge's decision-making is continuous, while an arbitrator's service is only occasional and episodic; an arbitrator may therefore choose to hear only those cases where he is certain he has no connection whatsoever with the parties and witnesses. 441 F.2d at 635.

lationship which allowed an unacceptable inference of partiality. 393 U.S. at 147.

The facts of this case are, if anything, more compelling than those which produced *Commonwealth Coatings*, particularly given the arbitrator's continuing concealment of his relationships with Yeargin's witness. There is no dispute in the record that the arbitrator realized and remembered the past association with Waldron (he told another arbitrator) [Tr. 578; Poppleton at 54]; that Waldron was one of and perhaps the most crucial witness for Yeargin, with his work and testimony being the only evidence offered on the issue of delay damages (the panel in fact decided that P&W had failed properly to coordinate and schedule the job) [Tr. 414, 610; R. 79]; and that the arbitrator never disclosed the past associations to the parties, continuing to conceal his employment of Waldron even long after the hearing when questioned about it on deposition. [Tr. 578-79; Morton at 41.]

These facts impelled the district court to make an express finding that the arbitrator should have disclosed the relationships with Waldron. [Tr. 580.] The fact that the arbitrator retained Waldron to teach a seminar on scheduling certainly suggests a high regard for Waldron's expertise and a predisposition to accept his opinions as valid and persuasive, particularly when those opinions were offered at arbitration on the same subject Waldron had been hired to teach. Given this finding that disclosure should have been made, the inquiry of both the district and the appellate courts should have ended with reversal of the award: *Commonwealth Coatings* teaches that nondisclosure of even an innocent relationship may create an appearance of partiality which should be avoided in a factfinder who has "free rein to decide the law as well as

the facts" and is virtually exempt from appellate review. *See Commonwealth Coatings*, 393 U.S. at 148-49.

The confusion reflected in the opinion below is not unique. Notwithstanding the strict principles enunciated in the plurality opinion of *Commonwealth Coatings*, the federal courts have continued to reach conflicting results on the issue of bias of an arbitrator.[5] Recently, for example, the Court of Appeals for the Second Circuit rejected the proposal that an "appearance of bias" test should be applied to measure the fundamental fairness of an arbitration proceeding. In *International Produce, Inc. v. Rosshavet*, 638 F.2d 548 (2d Cir.), *cert. denied*, 451 U.S. 1017 (1981), the Court held that a neutral arbitrator's participation as a non-party witness in a previous maritime arbitration involving the same law firms required neither disqualification of the arbitrator or invalidation of the award. The Court went even further to rule that a strictly-applied standard of *"evident"* and actual partiality would control in that circuit:

> "We agree, therefore, with the appellant, that the Supreme Court in *Commonwealth Coatings* did not expand the §10 standard of 'evident partiality' to include 'appearance of bias.'"

638 F.2d at 551.[6]

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5. This diversity is perhaps explainable in part by the number of opinions written in *Commonwealth Coatings*. Mr. Justice Black wrote the plurality opinion; Mr. Justice White, with whom Mr. Justice Marshall joined, wrote a concurring opinion; and Mr. Justice Fortas, joined by Mr. Justice Harlan and Mr. Justice Stewart, dissented, stating that a showing of actual bias should be required under Section 10.

6. In any event *International Produce* is not controlling on the facts in this case, since there the arbitrator disclosed the challenged relationship. In contrast, P&W here was deprived of even an opportunity to object until long after the award had been made.

In contrast, other courts have viewed *Commonwealth Coatings* as creating a *per se* rule. In short, the reviewing court need not enter the subjective thicket of whether the relationship was of a type which would have an actual, prejudicial effect on the arbitrator's deliberations; the inquiry is much simpler, being only "Did the arbitrator fail to disclose something he should have disclosed?" *See, e.g., Rogers v. Schering Corp.*, 165 F. Supp. 295, 301 (D.N.J.), *motion to dismiss app. denied*, 262 F.2d 180 (3d Cir. 1958), *aff'd per curiam*, 271 F.2d 266 (3d Cir.), *cert. denied sub nom. Hexagon Laboratories, Inc. v. Rogers*, 359 U.S. 991 (1959) (failure to disclose constituted a denial of "due arbitration process").

The result of these conflicting readings is a deep and potentially crippling confusion as to those guidelines which should be applied to measure an arbitrator's fairness.

An increasing number of judges, commentators and parties are heralding arbitration as a meaningful alternative to litigation with its long court dockets and its expensive and attenuated discovery procedures.[7] Thus, the controversy raised by this case reaches far beyond these particular litigants: the Federal Arbitration Act is due to be increasingly invoked as both the public and the judiciary seek means by which to alleviate the overcrowded conditions of the courts. Parties who elect to arbitrate already surrender important procedural and ap-

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7. For example, three pilot districts in the federal court system are experimenting with civil arbitration in a program under the auspices of the Department of Justice. D. Maloof, "Compulsory Nonbinding Arbitration: Painless Arbitration," 1980 *Insurance Counsel Journal* 262. The Eastern District of Pennsylvania, the Northern District of California, and the District of Connecticut have adopted procedures whereby the courts refer to arbitration certain civil cases in which the United States is a party. [Local Civil Rule 8 of the Eastern District of Pennsylvania is set forth in the Appendix.]

pellate rights in exchange for a more efficient and speedy disposition of their claims. If litigants must also surrender their right to a fact-finder who is free from any suspicion of partiality - indeed if, as now, they do not even know what standard will govern the analysis of the fairness of their hearing - the future of arbitration as an alternative is short-lived.

WHEREFORE, petitioners move this Court to grant a writ of certiorari to review the decision of the Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

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